In re Estate of MSH (Deceased) (Succession Cause E013 of 2024)
[2025] KEKC 2 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEKC 2 (KLR)

REPUBLIC OF KENYA

IN THE KADHIS COURT AT MOMBASA

SUCCESSION CAUSE E013 OF 2024

AH ATHMAN, CK

JANUARY 23, 2025

IN THE MATTER OF THE ESTATE OF MSH (DECEASED)

BETWEEN

FMSH ..... PETITIONER

AND

NSH ..... RESPONDENT

RULING

1. The respondent's Notice of motion dated 1st July, 2024 seeks orders inter alia that the Court be pleased to order D.N.A test against the alleged children of the deceased in this matter, set aside its judgment and all consequential orders made therein pending hearing and determination of the application, re-open the proceedings and allow the applicant to file reply to the petition and cancel the new title deed of the estate property and the same be transferred to her.

2. The respondent opposed the application through her replying affidavit dated 7th July, 2024. She deposed that the applicant had been served with the petition but failed to even enter appearance. She further deposed that no evidence has been attached by the applicant to prove her claim they are not biological children of the deceased. Further she argued the applicant lacks locus standi as her lineage to the deceased is not established. She averred further that DNA evidence is misleading and is aimed at tarnishing the dignity of her mother. She further deposed that all her official documents, including birth certificates, national Identity cards, school certificates, the deceased is indicated as the father of the children with his facilitation. She argued that the deceased had offered her for marriage as her legal waliy according to Islamic laws of marriage. It is her contention that according to Islamic jurisprudence, the only person who could deny paternity of his children is the father through a mandatory legal process. She averred that the children were born on the matrimonial bed of the deceased and their mother and therefore legal children under Islamic law based on hadith 'the matrimonial bed does not lie.'

3. Parties field written submission which they highlighted.

4. The facts briefly. The late MSH died on 24th October, 2023 at Mombasa after some illness. He left property known as Plot No Lamu/ Block II/ 2X1. The applicant is a sister to the deceased herein who was married to SMS. Three children: F, S and SMSH were born during the marriage of the deceased and SMS. The applicant had been collecting rent of the estate on behalf of the deceased during the deceased's illness. Upon his demise she continued collecting contrary to wishes of the children. The children moved to court for inheritance of the estate. The applicant was duly served with the petition and hearing notice but failed to enter appearance, reply to petition or attend hearing either physically or virtually. The matter proceeded to hearing under rules 68(1) (b) of the *Kadhi's Courts Rules (Procedure and Practice) 2020*. The court found and devolved the estate to the three children as the legal heirs of the deceased and ordered transmission of the title to them in specific shares. Upon delivery of judgment and execution of the decree, the applicant filed this application for setting aside the judgment and orders of the court.

5. The issues in this application are:

    1. Whether the judgment and orders in this matter should be set aside

    2. Whether or not the matter should be re-opened, the applicant allowed to file defense and the matter to be re-heard

    3. DNA as a means to prove paternity

6. The applicant submitted that she doubts the paternity of the children to the deceased and craved for DNA test to be conducted have the same confirmed. She submitted that the deceased had told him the children were not his but was only protecting (awasitiri) them. She stated that she was not aware they used the deceased name as their father and that the birth certificate is a forgery. She argued that the deceased had been ailing for a very long time but the petitioner didn't take care of him and are only interested in his estate. She further submitted that the deceased had directed him to give the daughters Kshs 200,000.00 each as remembrance but should not give them the estate property. She offered to under go DNA test herself as well to prove the deceased was her brother.

7. The respondent reiterated the averments in her reply to the application. She submitted the rumors on their paternity were going around while their father was alive. She submitted that he refuted the allegations and insisted that they are his children. She stated that the deceased was aware his relatives did not like them and was against their taking DNA test. She further submitted that the deceased handed her all his documents and instructed her not to release them to the applicant. The respondent argued that the burden proof rests with the applicant and the court should not help her get evidence for her case.

7. I have perused the file again to confirm the issue of service. The applicant was physically served with the petition and summons to enter appearance. She had declined to receive the documents. She was later served with the hearing notice with the court's link for hearing of the petition through her WhatsApp number but failed to appear. The court proceeded to hear the petitioner and her witnesses and entered judgment. Indeed, at the hearing of this application, the applicant admitted to having been served with the petition and summons. She indicated she refused service. Right to be heard is the cornerstone to fair trial, a constitutional imperative. A party who may be affected to order of the court must as of right be given right to be heard. However, refusal to receive service and appear is tantamount to refusal to be heard; it will not hinder the court from proceeding to hear a dispute. The respondent would be deemed to have relinquished his constitutional right to hearing.

8. The right to fair trial is protected by the *Constitution* of Kenya under article 50 (1) and Islamic law and traditions. It is based on Q.38.24 and the prophet's [may peace and blessings be upon him] direction

to Ali ibn Abu Talib [may blessings be upon him] when he appointed him the Kadhi of Yemen. It is a fundamental right and key concept of rules of natural justice. Njoki Ndungu SCJ, in the case of *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR stated:

> [257] Fair trial in principle incorporates rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own cause) otherwise referred to as the rule against bias.'

9. In *Steel and Morris v United Kingdom* [2005] ECHR 103, para 59 the court held:

> It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.'

10. Courts have discretion to set aside ex-parte judgment under order 12 rule 7 of the civil procedure rules. However, courts must be satisfied the application is aimed only at ensuring ends of justice and not an abuse of the court process. It must thus meet the requirements to set aside an ex-parte judgment. The requirements to set aside an ex parte judgment or order have been set out in the case of *Shah v Mbogo* and *Ongom v Owota*. The court held that for such Orders to issue inter alia the court must be satisfied:-

    a. either that the defendant was not properly served with summons; or

    b. that the defendant failed to appear in court at the hearing due to sufficient cause.

11. In construing sufficient cause, courts a guided by judicial principles of fairness and justice. In the case of *Daphene Parry v Murray Alexander Carson* the court had the following to say:-

> Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, ...”

12. The judgment entered in this matter, was a judgment on the merits, a regular judgment and not ex-parte judgment. The applicant elected not to enter appearance, reply to the petition or appear even virtually to participate and test the evidence of the petitioner/ respondent. Further the applicant failed to mention any reason either in her application, written submissions or during hearing of this application for her lack of filing a reply to the petition or appearance to argue her case. This should have been the crux of argument in her application. She hardly addressed the issue. However, Considering the weight and importance given by Islamic law to the rules of natural justice, the court would be inclined to give the applicant the benefit of doubt and exercise its discretion, re-open the proceedings to allow parties to canvass their cases. However, the applicant ought to at least have filed a draft reply to the petition for the court's consideration, lest it leads to abuse of the court process and waste of acute judicial time. She did not. In the circumstances, the prayer for setting aside the judgment and orders of the court is void of merit.

13. At the heart of this application is a key legal question of paternity of children born in a wedlock; whether and how such children can be considered illegal. The applicant claimed that although the children were born within the legal wedlock of the deceased and their mother, the children were illegal. She essentially alleges SMS, the children's mother and divorced wife of the deceased was promiscuous and had extra-marital affairs. Parties made passionate arguments on this issue in their submissions and during hearing of the application. The right time to canvass this issue is at trial because it depends on establishment of facts which then affect the law on the issue. In any case I have to examine whether

the applicant has locus standi to raise the issue and whether the application raised prima facie issues for consideration by the court.

14. Islamic law recognises four principles to establish paternity of children mainly: valid marriage, the minimum age of the child born alive from the marriage, attribution and acknowledgment of paternity. A valid marriage under Sunni law is sufficient to presume paternity of marriage unless the husband repudiates the child through the stringent process of li'an. A valid marriage is the basis of paternity in Islam. The prophet [PBUH] said: 'the child belongs to the owner of the bed'' Bukhari [2218], Muslim [3610]. For the child to be legal he or she must have been conceived after consummation of marriage and born at least six months after the marriage. It is the father alone who has the power to establish or deny paternity of the child to the exclusion of the mother or any other relation. Anwar A. Qadri, in 'Islamic Jurisprudence in the modern world', 402- 405 states:

> The word nasab or parentage means 'relationship to forefathers according to the Arabic lexicon. It is commonly restricted to the descent of a child from its father [sometimes to descent from the mother or occasionally employed to all relationships] [Muhammad Yusuf op cit, II, III, 404; Baillie, op cit, 391]. The definition of marriage as 'a contract for the purpose of legalising generation' implies the legal paternity of the man who has begotten a child in lawful wedlock [kanz ul-daqa'iq].
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> Paternity does not admit of positive proof, because the connection of the child with its father is secret. But it may be established by the word of the father himself, or by a subsisting legally constituted relationship between him and the mother of the child. There are three degrees in the establishment of paternity. At first it is by a valid marriage, secondly, an irregular or fasid contract of marriage coming near to the former and lastly by bondage. The effect of the first degree is to establish paternity without any claim [rejected by a process of li'an only].
>
> Where there exists between a man and a woman the relationship of husband and wife or such semblance as is recognised by the law, the children are either admittedly the lawful children of the man or capable of being made so by his acknowledgment. The semblance of lawful marriage for this purpose includes fasid marriage, and even batil marriage, where it subsisted in bona fide ignorance of the bar or shubha. Legitimacy results from the absence of criminal intent on the part of parents. Indeed, in sunni law, even the child of criminal intercourse or walad-ul-zina has full rights of inheritance to its mother though not to its father...
>
> The Shariah law provides four principles for the establishment of paternity. According to the first principle [above], a valid marriage contract itself is sufficient for paternity. If the wife bears a child before the contract of the marriage was entered into, then its paternity is established with the husband. The Hanafi jurists do not make it a condition that the two spouses must have come together after the marriage. The presumption of paternity in the Sunni law is so strong that in cases where the child is born six months from the date of the marriage and even within two years after the dissolution of the marriage contract, either by death of the husband or by divorce, a simple denial of paternity on the part of the husband would not take away the status of legitimacy from the child. However, this presumption based on the 'bed' may be disavowed by the husband for want of access and the ultimate probability of adultery by li'an procedure. For it, the Maliki, Shafi'i and Hanbali jurists hold that a valid marriage contract is a cause for fixing paternity if the coming together has been possible and if it is established that a coming together was not possible, then the paternity is not fixed. Ibn Taimiyyah goes so far and holds that the existence of the contract is a cause for the determination of paternity only in the event that the marriage has actually been consummated; in this view a mere coming together or the possibility thereof is not sufficient.

> As a second principle, the jurists consider that the minimum age for a child to be born alive and properly formed on the basis of the Qur'an is six months, this is the shortest period of gestation according to all schools. If a married woman bears a child less than six months after the marriage, its paternity is not attributed to the husband, since she was undoubtedly carrying the child before her marriage unless the husband claims and declares it as his on condition that he does not state that it was not the product of fornication...
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> The third principle relates to the attribution of paternity. The law is stringent against immorality and maKshs adultery a great sin. The traditions provide an adulterer to be stoned. On this there can be no legitimation of an issue of fornication. If a married woman has committed adultery, the paternity of the child is not attributed to her partner in adultery, It is attributed to her husband unless he repudiates it, but the acceptance of such repudiation is hedged about with many restrictions and reservations under methods of acknowledgment.
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> Acknowledgment or Iqrar is the fourth principle for the fixation of paternity. It is the only mode of filiation recognised by the Islamic Law. Under Sunni law, the father alone is authorised to establish the relationship of childhood to the total exclusion of the mother or any other relation. It is part of the Muslim legal system and is to be decided under the rules provided by that system...'

15. Case law has settled that only the father has locus standi to establish or deny paternity of children of a wedlock. Musyoka, Law Africa pp 293, *Islamic Law of Succession* cites the case of *Juma bin Mwenyezangu v Mwenye bin Abdallah* (1897 - 1905) EALR 95 Hamilton J, stated:

> under Islamic law a son is entitled to inherit the estate of his deceased father on the ground of the acknowledgment of paternity only of the deceased. It was also said that the proof of the marriage of the son's mother with the deceased is not necessary''.

16. In this case, the applicant does not dispute that the deceased was married to SMS, the mother of the children and that they were born in their wedlock. She admitted as much during the proceedings of the application. The deceased did not repudiate his children through the legal li'an process as required by Islamic law. All the children's birth certificate and/or identification bears the deceased as their father. The deceased also signed as guardian in the petitioner's marriage certificate. For all purposes he acknowledged and regarded them as his legal children. Even if the deceased had stated the children are not his, which is contested, the children having been born within a legal and valid marriage cannot be deemed illegal without the father undergoing li'an.

17. The final issue is that of DNA as a means to establish paternity. This is an issue of evidence. The *Evidence Act*, Cap 80 Laws of Kenya does not apply to the Kadhi's court, save as it is not inconsistent with Islamic laws of evidence. The applicable rules of evidence in the Kadhi's are Islamic laws of evidence. Section 6 of the *Kadhi's Court Act*, Cap 11 Laws of Kenya provides:

> The law and rules of evidence to be applied in a Kadhi's court shall be those applicable under Muslim law: Provided that-
>
> (i) all witnesses called shall be heard without discrimination on grounds of religion, sex or otherwise;
>
> (ii) each issue of fact shall be decided upon an assessment of the credibility of all the evidence before the court and not upon the number of witnesses who have given evidence...'

18. Islamic law of evidence does recognise DNA as a mode of evidence but does not rely on it entirely as a means to establish paternity. If a child is born out of legal wedlock, even if sired by the putative father, under Islamic law, the child is considered a biological but not a legal child. The same applies to a child born in a legal wedlock but born less than six months from the date of marriage contract. DNA helps to only strengthen claim of paternity of children born in a legal wedlock and born within the stipulated time by law. Children born within legal wedlock who DNA prove they are not biological children of the father are still considered legal children; they can only be denied paternity through the li'an process. Li'an is the process of taking special denial oaths first by the husband then by the wife in the absence of testimony under oath of four male witnesses who actually witnessed the alleged illegal sexual act. Qur'an, Nur, 24: 6 - 9 provide:

> "And for those who accuse their wives but have no witnesses except themselves, let the testimony of one of them be four testimonies (i.e. testifies four times) by Allah that he is one of those who speak the truth. And the fifth (testimony should be) the invoking of the curse of Allah on him if he be of those who tell a lie (against her). But it shall avert the punishment (of stoning to death) from her, if she bears witness four times by Allah, that he (her husband) is telling a lie. And the fifth (testimony) should be that the wrath of Allah be upon her if he (her husband) speaks the truth.'

19. The High Court in Kenya appreciated divergence of opinion of Muslim scholars on the issue of DNA to prove paternity. It held as necessary the application of li'an as the legal mode of evidence to prove infidelity of a wife in the absence of the required four male witnesses. In *Abdirahman Mohamed & another v Adan Yusuf*, Civil appeal No 13 of 2012 [Garissa], eKLR [2013], Stella N. Mutuku, J stated:

> The opinion of the Mohamed (Kadhi Nakuru) and Hassan (Kadhi Hola) on the issue of DNA testing under Muslim Law is that it is relied on but as the last resort. After reading their opinions on the issue of DNA, it is my belief that DNA testing is not outlawed under Muslim Law but must only be applied as the last resort. I have read some opinions tending to say DNA is not acceptable in certain Muslim communities and I am sure opinion is divided on the issue.
>
> Both Kadhis agree that the trial court did not apply the full spectrum of the Muslim Law of evidence. I am meant to understand that under Muslim Law of evidence when a man suspects his wife of adultery he is required to bring four male eye witnesses failing which both he and his wife take LI'AAN translated as oath of curse (Nisa 4:15) and those who have no witnesses except themselves should testify four times by Allah (Noor 24: 6-9). To my mind this is a very high standard of proof. To get four eyewitnesses is not easy! The failure to apply the full spectrum of Muslim Law in this case by the trial court may have led to miscarriage of justice.'

20. There is consensus among Muslim scholars that apart from proving infidelity, li'an has the effect of denying paternity of the child if the woman is pregnant from the act. In this case, the father is now deceased. He is the only one allowed by law to deny paternity. He cannot rise from the dead to perform this duty. The applicant, a sister to the deceased, lacks locus standi to question the paternity of the children born in a legal and valid wedlock. Even if DNA were to prove otherwise, the children would still be considered legal children of the deceased under Islamic law. In the circumstances, it would be an academic exercise to subject parties to undergo DNA test. Accordingly, we are unable to exercise our discretion to re-open the proceedings.

21. The application fails in its entirety. It is hereby dismissed. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA ON 23RD JANUARY, 2025.

HON. ABDULHALIM H. ATHMAN

CHIEF KADHI

In the presence of

Mr. Salim Kerrow, Court assistant.

Applicant

Respondent